

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
ANTHONY STELLA	:	
for Redetermination of Deficiencies or for Refund of	:	DETERMINATION
New York State and New York City Personal Income	:	DTA NO. 818183
Taxes under Article 22 of the Tax Law and the New York	:	
City Administrative Code for the Periods January 1, 1994	:	
through March 31, 1994 and July 1, 1994 through	:	
December 31, 1995; and for Revision of Determinations	:	
or for Refund of Sales and Use Taxes under Articles 28	:	
and 29 of the Tax Law for the Period June 1, 1995	:	
through November 30, 1995.	:	

Petitioner, Anthony Stella, 41-10 247th Street, Little Neck, New York 11363, filed a petition for redetermination of deficiencies or for refund of New York State and New York City personal income taxes under Article 22 of the Tax Law and the New York City Administrative Code for the periods January 1, 1994 through March 31, 1994 and July 1, 1994 through December 31, 1995 and for revision of determinations or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period June 1, 1995 through November 30, 1995.

The Division of Taxation, by its representative, Barbara G. Billet, Esq. (Michael P. McKinley, Esq., of counsel), brought a motion dated March 14, 2001 seeking summary determination in the above-referenced matter pursuant to sections 3000.5 and 3000.9(b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal. Petitioner did not respond to the Division of Taxation's motion. Accordingly, the 90-day period for the issuance of this determination commenced on April 13, 2001, the date petitioner's time to serve a response to the

Division's motion expired. Based upon the motion papers, the affidavits and documents submitted therewith, and all pleadings and documents submitted in connection with this matter, Thomas C. Sacca, Administrative Law Judge, renders the following determination.

ISSUE

Whether petitioner filed a timely petition with the Division of Tax Appeals following the issuance of notices of deficiency and determination.

FINDINGS OF FACT

1. The Division of Taxation ("Division") issued to petitioner, Anthony Stella, seven notices of deficiency dated October 7, 1996 and addressed to petitioner at "35-51 223 Street, Bayside, NY 11361-2236." The notices bear assessment identification numbers L-012731743, L-012731744, L-012731745, L-012731746, L-012731747, L-012731748 and L-012731749 and assert a total amount due of \$4,062.65. As indicated by the explanation and instructions sections of the notices, this amount consisted of a penalty in an amount equal to New York State and New York City withholding tax due but not paid by a corporation of which petitioner was deemed to be an officer or responsible person. The notices bear certified mail control numbers P 911 006 059, P 911 006 060, P 911 006 061, P 911 006 062, P 911 006 063, P 911 006 064 and P 911 006 065.

2. The Division issued to petitioner, Anthony Stella, two notices of determination dated April 12, 1996 and addressed to petitioner at "35-51 223 St., Bayside, NY 11361-2236." The notices bear assessment identification numbers L-011848790 and L-011848791 and assert a total amount of tax due of \$8,323.76, plus penalty and interest. The notices bear certified mail control numbers P 911 002 586 and P 911 002 587.

3. Notices of deficiency and determination, such as the ones at issue herein, are computer-generated by the Division's Computerized Case and Resource Tracking System ("CARTS") Control Unit. The computer preparation of such notices also includes the preparation of a certified mail record ("CMR"). The CMR lists those taxpayers to whom notices of deficiency and determination are being mailed and also includes, for each such notice, a separate certified control number. The pages of the CMR remain connected to each other before and after acceptance of the notices by the United States Postal Service through return of the CMR to the CARTS Control Unit.

4. Each computer-generated notice of deficiency and determination is pre-dated with its anticipated mailing date, and each is assigned a certified control number. This number is recorded on the CMR under the heading "Certified No." The CMR lists an initial date (the date of its printing) in its upper left hand corner which is approximately 10 days earlier than the anticipated mailing date for the notices. This period is provided to allow sufficient time for manual review and processing of the notices, including affixation of postage, and mailing. The initial (printing) date on the CMR is manually changed at the time of mailing by Division personnel to conform to the actual date of mailing of the notices. In this case, page 1 of the Notice of Deficiency CMR lists an initial date of September 26, 1996, which has been manually changed to October 7, 1996, and page 1 of the Notice of Determination CMR lists an initial date of April 9, 1996, which has been manually changed to April 12, 1996.

5. After a notice of deficiency or determination is placed in an area designated by the Division's Mail Processing Center for "Outgoing Certified Mail," a staffer weighs and seals each envelope and affixes postage and fee amounts thereon. A Mail Processing Center clerk then counts the envelopes and verifies by a random review the names and certified mail numbers of 30

or fewer pieces of mail against the information contained on the CMR. Thereafter, a Mail Processing Center employee delivers the stamped envelopes and associated CMR to one of the various branch offices of the U.S. Postal Service located in the Albany, New York area, where a postal employee accepts the envelopes into the custody of the Postal Service and affixes a dated postmark or his signature or both to the CMR.

6. In the ordinary course of business, a Mail Processing Center employee picks up the CMR from the post office on the following day and returns it to the originating office (CARTS Control) within the Division.

7. The CMR relevant to the issuance of the notices of deficiency is a 43-page, fan-folded (connected) computer-generated document entitled "Assessments Receivable, Certified Record for Zip + 4 Minimum Discount Mail." This CMR lists consecutive certified control numbers P 911 005 790 through P 911 006 259. There are no deletions from the list. Each such certified control number is assigned to an item of mail listed on the 43 pages of the CMR. Specifically, corresponding to each listed certified control number is a notice number, the name and address of the addressee, and postage and fee amounts. There are 11 entries on each page of the CMR except on page 43, where there are 8.

Information regarding the notices of deficiency issued to petitioner is contained on pages 25 and 26 of the respective CMR. Specifically, corresponding to certified control numbers P 911 006 059 through P 911 006 065 are notice numbers L-012731743 through L-012731749, along with petitioner's name and an address, which is identical to that listed on the subject notices of deficiency. Each page of the CMR bears the postmark of the Colonie Center Branch of the U.S. Postal Service, dated October 7, 1996.

The last page of the CMR, page 43, contains a pre-printed entry of "470" corresponding to the heading "Total Pieces and Amounts Listed." An employee of the USPS has signed page 43 of the certified mail record, affixed a postmark to each page of the certified mail record and noted the total number of pieces of certified mail received by circling the pre-printed "470" and by writing and circling the number "470" after the phrase "Total Pieces Received at Post Office" which also appears on the CMR.

The affixation of the Postal Service postmarks, the signature of the Postal Service employee, the circling of the pre-printed "470" and the writing and circling of the number "470" indicate that all 470 pieces listed on the CMR were received at the post office.

8. The CMR relevant to the issuance of the notices of determination is a 28-page, fan-folded (connected) computer-generated document entitled "Assessments Receivable, Certified Record for Zip + 4 Minimum Discount Mail." This CMR lists consecutive certified control numbers P 911 002 390 through P 911 002 692. There are no deletions from the list. Each such certified control number is assigned to an item of mail listed on the 28 pages of the CMR. Specifically, corresponding to each listed certified control number is a notice number, the name and address of the addressee, and postage and fee amounts. There are 11 entries on each page of the CMR except on page 28, where there are 6.

Information regarding the notices of determination issued to petitioner is contained on page 18 of the respective CMR. Specifically, corresponding to certified control numbers P 911 002 586 and P 911 002 587 are notice numbers L-011848790 and L-011848791, along with petitioner's name and an address, which is identical to that listed on the subject notices of determination. Each page of the CMR bears the postmark of the Colonie Center Branch of the U.S. Postal Service, dated April 12, 1996.

The last page of the CMR, page 28, contains a pre-printed entry of "303" corresponding to the heading "Total Pieces and Amounts Listed." This pre-printed entry has been manually circled and beneath it is the signature of a Postal Service employee.

The affixation of the Postal Service postmarks, the signature of the Postal Service employee and the circling of the "303" indicate that all 303 pieces listed on the CMR were received at the post office.

9. The Division generally does not request, demand or retain return receipts from certified or registered mail.

10. The facts set forth above in Findings of Fact "3" through "9" were established through the affidavits of Geraldine Mahon and James Baisley. Ms. Mahon is employed as the Principal Clerk in the Division's CARTS Control Unit. Ms. Mahon's duties include supervising the processing of notices of deficiency and determination. Mr. Baisley is employed as a Chief Mail Processing Clerk in the Division's Mail Processing Center. Mr. Baisley's duties include supervising Mail Processing Center staff in delivering outgoing mail to branch offices of the U.S. Postal Service.

11. The address on the subject notices of deficiency and determination is the same as the address given on petitioner's filed 1994 resident income tax return (Form IT-201), which was filed by petitioner on April 15, 1995. Petitioner gave the same address on an amended 1994 resident income tax return filed on January 2, 1996.

CONCLUSIONS OF LAW

A. A motion for summary determination may be granted:

if, upon all the papers and proof submitted, the administrative law judge finds that it has been established sufficiently that no material and triable issue of fact is presented and that

the administrative law judge can, therefore, as a matter of law, issue a determination in favor of any party (20 NYCRR 3000.9[b][1]).

B. Here, petitioner did not respond to the Division's motion; he is therefore deemed to have conceded that no question of fact requiring a hearing exists (*see, Kuehne & Nagel v. Baiden*, 36 NY2d 539, 544, 369 NYS2d 667, 671; *Costello v. Standard Metals*, 99 AD2d 227, 472 NYS2d 325). Moreover, petitioner presented no evidence to contest the facts alleged in the Mahon and Baisley affidavits; consequently, those facts may be deemed admitted (*see, Kuehne & Nagel v. Baiden, supra*, at 544, 369 NYS2d at 671; *Whelan By Whelan v. GTE Sylvania*, 182 AD2d 446, 582 NYS2d 170, 173).

C. Tax Law § 681(a) authorizes the Division of Taxation to issue a notice of deficiency to a taxpayer where the Division determines that there is a deficiency of income tax. This section further provides that such a notice "shall be mailed by certified or registered mail to the taxpayer at his last known address." A taxpayer may file a petition with the Division of Tax Appeals seeking redetermination of the deficiency, or alternatively, a request for a conciliation conference with the Bureau of Conciliation and Mediation Services, within 90 days of the mailing of the notice of deficiency (*see*, Tax Law § 689[b]; § 170[3-a][a]).

D. Tax Law § 1138 (former [a][1]) authorizes the Division of Taxation to issue a notice of determination to a taxpayer if a return required under Article 28 is not filed or if a return when filed is incorrect or insufficient. Pursuant to such section, such determination "shall finally and irrevocably fix the tax" unless the person against whom it is assessed files a petition with the Division of Tax Appeals seeking revision of the determination within 90 days of the mailing of the notice. As an alternative to filing a petition with the Division of Tax Appeals, a taxpayer may request a conciliation conference with the Division of Taxation's Bureau of Conciliation and

Mediation Services. The time period for filing such a request is also 90 days (Tax Law § 170[3-a][a]; 20 NYCRR 3000.3[c]).).

E. The filing of a petition or a request for conciliation conference is a prerequisite to the jurisdiction of the Division of Tax Appeals (*Matter of Roland*, Tax Appeals Tribunal, February 22, 1996). If a taxpayer fails to file a timely protest to a statutory notice (notice of deficiency or determination), the Division of Tax Appeals has no jurisdiction over the matter and is precluded from hearing the merits of the case (*see, Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989).

F. Where, as here, the Division claims a taxpayer's protest against a notice was not timely filed, the initial inquiry must focus on the issuance (i.e., mailing) of the notice. Where a notice is found to have been properly mailed, "a presumption arises that the notice was delivered or offered for delivery to the taxpayer in the normal course of the mail" (*see, Matter of Katz*, Tax Appeals Tribunal, November 14, 1991). However, the "presumption of delivery" does not arise unless or until sufficient evidence of mailing has been produced and the burden of demonstrating proper mailing rests with the Division (*id.*). The Division may meet this burden by evidence of its standard mailing procedure, corroborated by direct testimony or documentary evidence of mailing (*see, Matter of Accardo*, Tax Appeals Tribunal, August 12, 1993).

G. In this case, the Division introduced adequate proof of its standard mailing procedures through the affidavits of Ms. Mahon and Mr. Baisley, two Division employees involved in and possessing knowledge of the process of generating and issuing (mailing) notices of deficiency and determination (*see*, Finding of Fact "10").

H. The Division also presented sufficient documentary proof, i.e., the CMR, to establish that the notices of deficiency at issue were mailed to petitioner on October 7, 1996. Specifically,

this 43-page document lists sequentially numbered certified control numbers with corresponding names and addresses. All 43 pages of the CMR bear a U.S. Postal Service postmark dated October 7, 1996. Additionally, as part of the standard procedure for the issuance of notices of deficiency, a postal employee signed page 43 of the CMR, circled the existing “470” on that page and wrote and circled another “470” to indicate receipt by the post office of all 470 pieces of mail listed thereon (*cf.*, ***Matter of Roland, supra*** [where the mailing documents were found to be inadequate because there was no showing of the source of the affiant’s knowledge as to the significance of the circling of the number of total pieces of mail listed]). The addresses listed on the CMR match that utilized by petitioner on his 1994 Resident Income Tax Return. This evidence is sufficient to establish that the Division mailed the subject notices of deficiency on October 7, 1996 to petitioner at his last known address.

I. In addition, the Division presented sufficient documentary proof, i.e., the CMR, to establish that the notices of determination at issue were mailed to petitioner on April 12, 1996. Specifically, this 28-page document lists sequentially numbered certified control numbers with corresponding names and addresses. All 28 pages of the CMR bear a U.S. Postal Service postmark dated April 12, 1996. Additionally, as part of the standard procedure for the issuance of notices of determination, a postal employee signed page 28 of the CMR and circled “303” on that page to indicate receipt by the post office of all 303 pieces of mail listed thereon (*cf.*, ***Matter of Roland, supra***). This evidence is sufficient to establish that the Division mailed the subject notices of determination to petitioner on April 12, 1996.

J. Petitioner’s petition was mailed on September 26, 2000, which is more than four years after the date of mailing of the subject notices of determination and almost four years after the

date of mailing of the notices of deficiency. The petition was therefore untimely filed (*see*, Tax Law §§ 689(b); 1138[a][1]; 170[3-a][a]; 20 NYCRR 3000.3[c]).

K. It should be noted, however, that petitioner is not without recourse as to the notices of deficiency issued, for he may pay the disputed tax and, within two years from the date of payment, apply for a refund (Tax Law § 687[a]). If his request for a refund is denied, petitioner may then proceed with another petition requesting a hearing or a conciliation conference (Tax Law §§ 689[c]; 170[3-a][a]; *Matter of Rosen*, Tax Appeals Tribunal, July 19, 1990).

L. The petition of Anthony Stella is dismissed.

DATED: Troy, New York

ADMINISTRATIVE LAW JUDGE